Question Q217

National Group:	Greece
Title:	**The patentability criterion of inventive step/non-obviousness**
Contributors:	Nicholas Vosemberg-Vretos
Reporter within Working Committee:	Nicholas Vosemberg-Vretos
Date:	June 14, 2011

Questions

LEVEL OF INVENTIVE STEP/NON-OBVIOUSENESS

1. What is the standard for inventive step/non-obviousness in your jurisdiction? How is it defined?

   Greek Patent Law No. 1733/1987 for "Technology Transfer, Inventions and Technological Information" deals with and provides in Article 5 paragraphs 1, 3 and 4 for the requirements for an invention to be patentable. The requirements are: the "new" of the invention, **the inventive activity** (in other words "the inventive step") and the susceptibility of industrial application of the invention.

   Greek Patent Law is fully harmonized with the European Patent Convention (EPC) which provides under Article 52(1) in conjunction with Article 56, first sentence "European Patents shall be granted for invention, which, among other things, involve an inventive step, that is, the invention having regard to the state of the art, must not be obvious to a person skilled in the art".

   According to Article 5 paragraph 4 of the Greek Patent Law No. 1733/1987 "an invention shall be considered as involving an inventive activity (inventive step) if, having regard to the state of the art, it is not obvious to a person skilled in the art".

   Accordingly, the inventive step, or inventive activity, is interpreted to mean everything which extends beyond the obvious technological progress and it consists by itself a progressive leap, which could not be obviously known to an ordinary skilled person. The inventive step must be something new for the state of the art. The latter comprises not only what is expressly described in written documents, but everything and anything which an ordinary skilled person could have arrived at by using similar means. Everything and anything which exceeds the capability of the ordinary skilled person in the art to which the said matter pertains, must be regarded as "inventive step".

2. Has the standard changed in the last 20 years? Has the standard evolved with the technical/industrial evolution of your jurisdiction?

The standard changed in the last 20 years due to the technical/industrial evolution and the new requirements imposed thereby. The obligatory harmonization of the provisions of the Greek Patent Law with those of the European Community was another essential factor which has as a result the enactment of more precise and strict requirements for the patentability of an invention. Under previous Patent Law in act (L. 2527/1920) there was no explicit definition of the "new" of an invention. The patentability of an invention was secured if the invention complied with the negative requirement provided in Article 2 of the L. 2527/1290 "An invention is not considered "new", when, at the time of the filing of the respective application for its granting, is sufficiently known in the jurisdiction or has already been described in publications or drafts published in the jurisdiction, so that it is capable of being applied in practice by a skilled person". The aforesaid requirement of the "new" of an invention was interpreted by the Greek Courts and the respective (previous) jurisprudence to mean "the remarkable ingenuity or remarkable improvement of an already known result". The technical/industrial evolution during the years 1970-1990 had an essential impact to the Courts' jurisprudence, and eventually the Greek Courts, when adjudicating as to the "new" of an invention, started examining the "inventive step" requirement or started applying the following guideline "as to whether the solution of the technical problem is beyond the capability of an average skilled person" or "it does not consist a link in the chain of the technical progress, but "it is something which exceeds the normal technological progress and consists by itself a progressive leap, which could not be obviously known to an ordinary skilled person".

3. Does your patent-granting authority publish examination guidelines on inventive step/non-obviousness? If yes, how useful and effective are the guidelines?

   No. –

4. Does the standard for inventive step/non-obviousness differ during examination versus during litigation or invalidity proceedings?

   Yes. The Greek Patent Office does not follow the examinational system as same is followed in EPO and in many other jurisdictions. The Greek PTO examines the fulfillment of the typical and negative requirements imposed by Law and proceeds with a limited (prima facie) examination of the essential requirements (inventive step/state of prior art), which has no legal effect, because, the patent granted, according to article 8 paragraph 11 sentence 2 of the L. 1733/87 "certifies the complete and orderly nature of the patent application". In view of the above described non examinational system, the granting of the patent does not guarantee that the invention fulfils the requirements imposed by the Law and thus the patent may be annulled by a Court's decision.

   The examination of the requirement of inventive step rests to the Greek Courts during litigation or invalidity proceedings. Article 15 paragraph 1 sub-paragraph (b) of the Greek Patent Law No. 1733/1987 provides that "the patent shall be declared null by the Court decision, if the invention is not patentable under Article 5". Accordingly, anyone who has legal interest, either direct or indirect, may institute legal proceedings before the competent Greek Courts requesting the nullification of a patent due to the lack of inventive step.

CONSTRUCTION OF CLAIMS AND INTERPRETATION OF PRIOR ART

5. How are the claims construed in your jurisdiction? Are they read literally or as would be understood by a person skilled in the art?

   The claims are construed as same would be understood by a person skilled in the art.

6. Is it possible to read embodiments from the body of the specification into the claims?

   Yes, but in a very limited or slightly modified way.

7. How is the prior art preted? Is it read literally or interpreted as would be understood by a person skilled in the art? Is reliance on inherent disclosures (aspects of the prior art that are not explicitly mentioned but would be understood to be present by a person skilled in the art) permitted?

   The state of the prior art is a legal fiction which consists of, and/or includes, all existing knowledge at the date before the date of the filing of the patent application. Greek Patent Law in Article 5 paragraph 3 determines "the state of the art" as "anything made available to the public anywhere in the world by means of a written or oral description or in any other way before the date of the filing of the patent application or before the date of the priority claimed".

   Therefore the state of the prior art has a global and implicit character (it is not connected with the territory element as under the previous Patent Law in act) and it comprises anything which is known to the public prior to the date of the filing of the patent application irrespectively of

   - the way such information and/or knowledge has been disclosed
   - the place
   - whether or not the inventor-applicant was aware of it
   - whether or not such disclosure was made by the applicant of the invention or by the inventor

   In other words, the state of art comprises all written documents, oral announcements, statements, even conversations, web pages, advertising brochures and manuals which are available to the public anywhere in the world prior to the date of the filing of the patent application.

   While EPC (Article 54 paragraph 2) specifically refers to the word "use", there is no such reference under Greek Patent Law which uses indefinitely instead the wording "any other way".

   Therefore the prior art is interpreted as would be understood by a person skilled in the art and comprises aspects of the prior art that are not explicitly mentioned, but would be understood to be present by a person skilled in the art) permitted.

8. Do the answers to any of the questions above differ during examination versus during litigation?

   As already discussed above under (question 4) the Greek Patent Office does not follow the examinational system. Questions as to whether or not the problem' s solution belongs or not to the sphere of the "prior state of the art" is a matter to be solved by the Civil Courts during litigation or invalidity proceedings. The party instituting such proceedings must prove by any available legal means of evidence, including the testimony of witnesses (experts, skilled persons etc.), that the invention is not patentable because a skilled person would (not merely could) combine all documents so as to arrive at the claimed invention. This argumentation is not permitted to apply hindsight. The person instituting the above proceedings must base the reasoning on the state of the art known the day before the date of the filing of the patent application and on the knowledge an ordinary skilled person had at that day.

COMBINATION OR MODIFICATION OF PRIOR ART

9. Is it proper in your jurisdiction to find lack of inventive step or obviousness over a single prior art reference? If yes, and assuming the claim is novel over the prior art reference, what is required to provide the missing teaching(s)? Is an argument sufficient? Is the level of the common general knowledge an issue to be considered?

   Yes, it is proper under Greek Patent Law to find lack of inventive step over a single prior art reference (closest prior art) and in particular when the problem-solution approach is used. In case the invention is novel over the prior art and for the purpose of establishing the inventive step in court litigation proceedings, the applicant/inventor must prove that his invention comprises a solution to the technical problem, in other words the solution would (not merely could) not deducted from the prior art. Mere argumentation is not enough.

   The level of the common general knowledge is an issue to be considered, since the general knowledge belongs to the “state of the art”.

10. What is required to combine two or more prior art references? Is an explicit teaching or motivation to combine required?

    Combination of known factors: Two or more already known methods/factors are combined for the purpose of producing a new. This is patentable and involves inventive step, in case the result was not obvious to a person skilled in the art. Further the following must be examined: whether the solution could have not been achieved without the independent benefits of each one of the combined methods/factors. The combined elements must be interactive, the mere bringing together thereof is not enough.

    Greek Patent legislation does not mention any implicit teaching or any motivation to combine two or more prior art references.

11. When two or more art references are combined, how relevant is the closeness of the technical field to what is being claimed? How relevant is the problem the inventor of the claim in question was trying to solve?

    Greek Patent Law does not expressly stipulate the relevance of the closeness of the technical field to what is being claimed, when two or more prior art references are combined. The inventive step shall be examined under the scope of Article 5 paragraphs 3 and 4 of the L. 1733/87, namely if it solves the problem in a manner which is not obvious to a person skilled in the art. The cited documents must be relevant to the technical field of the problem solved by.

12. It is permitted in your jurisdiction to combine more than two references to shoe lack of inventive step or obviousness? Is the standard different from when only two references are combined?

    In order to establish lack of inventive step the Law permits any means of legal evidence, including the combination of more than two art references, provided that the said combination is obvious to a person skilled in the art. There is no difference when only two references are combined.

13. Do the answers to any of the questions above differ during examination versus during litigation?

Please refer to question 4 above.

TECHNICAL PROBLEM

14. What role, if any, does the technical problem to be solved play in determining inventive step or non-obviousness?

    The role of the technical problem to be solved in determining the inventive step is essential and of primary importance.

15. To what degree, if any, must the technical problem be disclosed in the as-filed specification?

    According to Greek Patent Law the specification must describe the technical problem to be solved by the invention. Article 7 paragraph 4 of the L. 1733/1987 provides that "the description of the invention shall be complied as to the sufficiently carried out by a third person skilled in the art".

ADVANTAGEOUS EFFECTS

16. What role, if any, do advantageous effects play in determining inventive step of non-obviousness?

    The advantageous effects of an invention plays a certain role, even of secondary consideration, in determining the inventive step.

17. Must the advantageous effects be disclosed in the as-filed specification?

    Yes, the applicant/inventor must explain in an express and implicit manner the advantageous effects of his invention in the text of the specification.

18. Is it possible to have later-submitted data considered by the Examiner?

    Yes. According to Article 7 paragraph 9 of the L. 1733/87 "within a period of four months from the filing date, the applicant can submit any missing drawings or other supporting documents, complete any lacking data and correct any eventual errors n the draft of the documents and of other supporting documentation in accordance with the Law provisions. In this case the filing of the application shall be considered complete".

19. How "real" must the advantageous effects be? Are paper or hypothetical examples sufficient?

    The invention shall be described in the specification in a specific, clear and complete manner so that it can be carried out by a third person skilled in the art. If, not the granting of the patent can be refused or the granted patent can be cancelled by a Court's decision. Therefore, paper or hypothetical examples are not sufficient.

20. Do the answers to any of the questions above differ during examination versus during litigation?

    Please refer to question 4 above.

TEACHING AWAY

21. Does your jurisdiction recognize teaching away as a factor in favor of inventive step/non-obviousness? Must the teaching be explicit?

    Yes. The teaching away is a factor, even of secondary consideration, in favor of inventive step. The teaching must be explicit and widespread among the person skilled in the respective field.

22. Among the other factors supporting inventive step/non-obviousness, how important is teaching away?

    It is rather difficult to establish in a Court litigation proceedings involving the nullification of a patent the "teaching away factor". Therefore a person requesting the nullification of a patent prefers to base its law-suit on other more important arguments which can be easily proved and established with the Court.

23. Is there any difference in how teaching is applied during examination versus in litigation?

    Please refer to question 4 above.

SECONDARY CONSIDERATIONS

24. Are secondary considerations recognized in your jurisdiction?

    Yes. –

25. If yes, what are the accepted secondary considerations? How and to what degree must they be proven? Is a close connection between the claimed invention and the secondary considerations required?

    The following are examples of accepted secondary considerations:

    -The long non satisfied need for the solution of a certain problem, which is finally solved by the claimed invention. The failure of others to solve the problem is an indication (secondary argumentation) that the invention is patentable;
    -The attempts of the skilled persons: In cases where the skilled persons have unsuccessfully tried to solve the problem, which the invention solved, then we may with certainty allege that there exists inventive step;
    - The commercial success of the invention is another argument which indicates the inventive step. However the said commercial success must not be the result of other parameters, such as: advertising campaign, low price of the product of the invention or of a trade monopoly, which may falsify the technical value of the invention;
    - the pros of the invention (e.g. improvement, increase of efficiency, material or time saving, simplification of the method etc.);
    - the replacement of the raw materials may be considered as an inventive step, when a new quality is invented and the application of the invention leads to a new achievement;
    - transfer: In Patent Law the word "transfer" refers to cases where the known solution of a problem is used in order to solve another problem. In such cases, there is no patentability inventive step, because an already known technical rule is used in another field, thus the above does not exceed the knowledge of an ordinary skilled person. However there are cases where the application of the "transfer" may exceed the knowledge of an ordinary skilled person, especially when the inventor, by

applying the transfer procedure, faces with unforeseen difficulties or when, by applying the said transfer, the state of the art is improving or the solution of the problem results to a great commercial success. In such cases, after careful examination of all factors, there might be inventive step.
- combination of two or more factors: two or more already known factors are combined for the purpose of producing a new. This involves an inventive step when the result is not obvious to a person skilled in the art.
- the change of the shape or dimensions of the product is not patentable, however if the said change alters the functions of the product, then there might be inventive step.
- proportional chemical procedure: This is the technical procedure according to which new conditions (temperature, pressure, catalytic agent) or new materials are used for the first time in an already known method. If the said procedure results to a product with valuable qualities and their superiority is recognized by the scientific society, then we might have inventive step.

To establish the inventive step in all the above cases mere argumentation is not sufficient. Strong argumentation is necessary. There must be a close connection between the claimed invention and the secondary considerations.

26. Does the answers to any of the questions above differ during examination versus during litigation?

Please refer to question 4 above.

OTHER CONSIDERATIONS

27. In addition to the subjects discussed in questions 4-26 above, are there other issues, tests, or factors that are taken into consideration in determining inventive step/non-obviousness in your jurisdictions?

The Court, when having to decide as to whether a patent involves inventive step or not, must apply the problem-solution approach which consists of the following steps:

- The Court must first determine which is the closest relevant state of art
- The Court must isolate in an objective way the technical problem to be solved
- And finally the Court must evaluate, having examining the closest prior art as a whole and the objective technical problem, whether the solution of the claimed invention would have been obvious to a person skilled in the relevant art at the date of the filing of the invention.

TEST

28. What is the specific statement of the test for inventive step/non-obviousness in your jurisdiction? Is there jurisprudence or other authoritative literature interpreting the meaning of such test, and, if so, provide a brief summary of such interpretation?

The problem-solution approach is interpreted in literature and in jurisprudence as a test applying in order to ascertain in an objective way the patentability of the invention compared with the closest prior art.

29. Does such test differ during examination versus during litigation?

Please refer to question 4 above.

PATENT GRANTING AUTHORITIES VERSUS COURTS

30. If there are areas not already described above where the approach to inventive step/non-obviousness taken during examination diverges from that taken by courts, please describe these areas.
    There are no such areas.

31. Is divergence in approach to inventive step/non-obviousness between the courts and the patent granting authority in your jurisdiction problematic?

    No. -

REGIONAL AND NATIONAL PATENT GRANTING AUTHORITIES

32. If you have two patent granting authorities covering your jurisdiction, do they diverge in their approach to inventive step/non-obviousness?

    No, in Greece there is only one patent granting authority and the Greek Patent Law is fully harmonized with the European Patent Convention.

33. If yes, is this problematic?

    -

II. PROPOSALS FOR HARMONIZATION

34. Is harmonization of inventive step/non-obviousness desirable?

    Yes.-

35. Is it possible to find a standard for inventive step/non-obviousness that would be universally acceptable?

    We consider the inventive step as a rather complicated factor involving technical standards and data management/administration/organization issues which differ from country to country. Therefore, a universally acceptable standard is rather difficult to be achieved.

36. Please propose a definition for inventive step/non-obviousness that you would consider to be broadly acceptable.

    An invention shall be considered as involving an inventive step if, having regard to the state of the art, it is not obvious to a person skilled in the art.

37. Please propose an approach to the application of this definition that could be used by examiners and by courts in determining inventive step/non-obviousness.

    In determining the inventive step the examiners and the courts must take into consideration all written documents, oral descriptions and applications thereof belonging to the relevant state of art and compare same with the claimed invention, provided however that all the above is obvious to a person skilled in the relevant state of art.

SUMMARY

The inventive step is one of the most important requirements under Greek Patent Law for the patentability of an invention. An invention shall be considered as involving an inventive step, if, having regard to the state of the art, it is not obvious to a person skilled in the art. The state of the art shall be held to comprise anything made available to the public anywhere in the world by means of a written or oral description or in any other way, before the filing date of the patent application.

For the purpose of involving an inventive step, the said invention must solve a technical problem in a manner which exceeds the normal technological progress in the field and such solution is not obvious to a person skilled in the art. For the purpose of assessing the inventive step, the claimed teaching as a whole should be taken into consideration. The level of the common knowledge is an issue to be also examined because the general knowledge consists a part of the state of the art. Secondary considerations, such as the long non satisfied need for the solution of the certain problem, the unsuccessful attempts of the skilled persons, the commercial success of the invention, the combination of two or more already known factors and the like, are also considered in determining inventive step, provided there exists close relevance of the said considerations with the claimed invention.

The Greek Patent Office proceeds with a limited (prima facie) examination of the essential requirements (inventive step/novel of the invention), which has no legal effect, because, the patent granted merely “certifies the complete and orderly nature of the patent application”. In view of the non examinational system, the granting of the patent does not guarantee that the invention fulfils the requirements imposed by the Law and thus the patent may be annulled by a Court’s decision. Anyone who has a direct or indirect legal interest may file before the competent court a law suit requesting the nullification of a granted patent due to the lack of inventive step. In court litigation proceedings each party bears the burden of proof of its allegations. Mere argumentation is not sufficient.

The Greek Courts, for the purpose of assessing the inventive step, apply the problem-solution approach. They a) determine the closest state of prior art b) isolate in an objective way the technical problem and c) based on the closest prior art and the objective problem findings, adjudicate as to whether the claimed invention solves the problem in a manner not obvious to a person skilled in the art. The problem-solution approach is interpreted in literature and jurisprudence as an objective test by which the assessment of the inventive step is based on the technical evaluation of the inventiveness of the claimed invention compared with the closest prior art.

In our opinion the wording “An invention shall be considered as involving an inventive step, if, having regard to the state of the art, it is not obvious to a person skilled in the art” is a satisfactory definition of the inventive step. A universally acceptable definition of the inventive step is rather difficult to be achieved because, the inventive step involves technical standards and data management, administration, organization issues which differ from country to country. In determining the inventive step the examiners and the courts must take into consideration all written documents, oral descriptions and applications thereof belonging to the relevant state of the art and compare same with the claimed solution provided however that all the above is obvious to a person skilled in the relevant state of art.

RĒSUMĒ

L’activité inventive est une des plus importantes exigences requises en vertu de la législation grecque pour la brevetabilité d’ une invention. Une invention est considérée comme impliquant une activité inventive si, compte tenue de l’état de l’art, elle n’est pas évidente pour une personne du métier. L’état de l’art se trend á comprendre quoi que ce soit mis á la disposition du public partout dans le monde par les moyens d’une description écrite ou orale ou d’autre moyen, avant le dépôt de la demande du brevet.

Dans de bût d'impliquer une activité inventive, l'invention doit résoudre un problème technique d'une manière qui dépasse le déroulement normal technologique dans le Domain respectif et une telle solution n'est pas évidente pour une personne du métier.
Afin de déterminer l'activité inventive, l'enseignement revendiqué doit être considéré comme un tout. Le niveau des connaissances générales est une question á considérer, puisque la connaissance générale fait partie de l'état de l'art.
Considérations second aires, comme les besoins á longue durée insatisfaits de la solution du problème, les tentative infructueuses des personnes qualifies, le succès commercial de l'invention, la combinaison de deux ou plusieurs facteurs déjà connus et autres, sont également pris en compte pour déterminer l'activité inventive, á condition qu'il existe un grand rapport de cette considérations á l'invention revendiquée.
L'Office Qrec de brevets procède á un examen limité des exigences essentielles (activité inventive) qui n'a aucun effet légal, parce que le brevet délivre atteste simplement le caractère complet et la légalité officielle de la demande du brevet.
Compte tenu du système non examinatrice, l'octroi du brevet ne garantit pas á ce que l'invention réponde aux exigences imposes par la loi et donc le brevet peut être annulé par une décision juridique.
Quiconque a un intérêt direct ou indirect peut déposer auprès du tribunal compétent une action demandant l' annulations de brevet en raison de l'absence d'activité inventive.
Dans une procédure au tribunal, chaque partie support la charge de la prévue de ses allégations. Une simple argumentation ne suffit pas.
Les tribunaux grecs ā fin d'évaluer l'activité inventive appliquent l'approche problème – solution. Il faut a) déterminer le plus proche de l'état de l'art antérieur b) isoler de manière objective le problème technique et c) basée sur des conclusions, statuer si l' invention revendiquée résout le problème d'une manière non évidente pour une personne du métier.
L'approche problème – solution est interprétée dans la Jurisprudence et la littérature comme un test objectif pour lequel l'évaluation de l'activité inventive est fondée sur l'évaluation technique del' inventivité de l'invention revendiquée par rapport ā l'art le plus proche.
A notre avis, le libellé "une invention est considérée comme impliquant une activité inventive si, compte tenue de l'état de l'art, n'est pas ēvidente pour une personne du métier" est une définition satisfaisante de l'activité inventive. Une définition universellement acceptable de l'activité inventive est assez difficile ā atteindre, parce qu'elle implique des normes techniques et de gestion d'administration et d'organisation qui différent d'un pays á autre.
Pour la détermination de l'activité inventive, les examinateurs et les tous les documents écrits, les descriptions orales et leurs applications appartenant ā l'état de la technique concrète et de comparer les mêmes avec la solution revendiquée á condition toute fois que tous les ci-dessus soient évidentes pour une personne du métier.

ZUSAMMENFASSUNG

Die erfinderische Tätigkeit ist eine der wichtigsten Voraussetzungen im Griechischen Patentamt, die bestimmt, ob eine Erfindung patentfähig ist. Eine Erfindung ist nur dann patentfähig, wenn sie sich für den Fachmann nicht in naheliegender Weise aus dem Stand der Technik ergibt. Den Stand der Technik bildet alles, was vor dem Tag der Einreichung der Patentanmeldung, durch schriftliche oder mündliche Beschreibung oder in sonstiger Weise der Öffentlichkeit zugänglich gemacht worden ist.
Die beanspruchte Erfindung soll, um die erfinderische Tätigkeit zu beinhalten, ein technisches Problem in einer Weise lösen, die den normalen technologischen Fortschritt in dem Fachgebiet übertrifft und eine solche Lösung soll sich für den Fachmann nicht ergeben.
Zur Beurteilung der erfinderischen Tätigkeit soll die gesamte beanspruchte Lehre unter Berücksichtigung genommen werden. Der Grad des gemeinsamen Wissens ist ebenfalls ein Thema, das geprüft werden soll da das allgemeine Wissen ein Teil der Stand der Technik darstellt. Zusätzliche Gesichtspunkte, wie das seit Langem bestehendes Bedürfnis nach einer Lösung des bestimmten Problems, das erfolglose Bemühen der Fachwelt, der kommerzieller Erfolg der Erfindung, die Kombination von zwei oder mehreren bereits

bekannten Faktoren oder ähnliches sind ebenfalls Indizien für die erfinderische Tätigkeit, unter der Voraussetzung, dass eine nahe Relevanz der genannten Gesichtspunkten mit der beanspruchten Erfindung besteht.
Das Griechische Patentamt geht mit einer begrenzten (prima facie) Überprüfung der wichtigen Voraussetzungen vor (erfinderische Tätigkeit – Neuartigkeit der Erfindung), die keine rechtliche Gültigkeit hat, weil das genehmigte Patent nur „die Vollständigkeit und die Ordnungsmäßigkeit des Patentantrags bestätigt". Angesichts eines nicht Prüfungsgemäßen Systems, die Genehmigung eines Patents gewährleistet nicht, dass die Erfindung die auf Gesetz beruhenden Voraussetzungen erfüllt und demzufolge könnte ein Patent durch ein Gerichtsurteil annulliert werden. Jede Person mit einem unmittelbaren oder mittelbaren rechtlichen Interesse könnte vor dem zuständigen Gericht eine Klage für die Nichtigkeitserklärung des genehmigten Patents wegen mangelnder erfinderischer Tätigkeit einreichen. Im Gerichtsverfahren trägt jede Partei die Beweislast für deren Behauptungen. Bloße Argumentation ist unzureichend.
Die Griechische Gerichte haben für die Beurteilung der erfinderischen Tätigkeit den sogenannten Aufgabe-Lösungs-Ansatz angelegt. Der Aufgabe-Lösungs-Ansatz gliedert sich in drei Phasen: a) Ermittlung des nächstliegenden Stands der Technik, b) Bestimmung der zu lösenden objektiven technischen Aufgabe, und c) Prüfung der Frage, ob die beanspruchte Erfindung angesichts des nächstliegenden Stands der Technik und der objektiven technischen Aufgabe für den Fachmann naheliegend gewesen wäre. Der Aufgabe-Lösungs-Ansatz wird in der Literatur und in der Rechtsprechung als eine objektive Prüfung interpretiert, wobei die Beurteilung der erfinderischen Tätigkeit auf die technische Bewertung der erfinderischen Leistung für die beanspruchte Erfindung beruht, im Vergleich zu dem nächstliegenden Stand der Technik.
Unserer Meinung nach ist der Wortlaut „Eine Erfindung ist nur dann patentfähig, wenn sie sich für den Fachmann nicht in naheliegender Weise aus dem Stand der Technik ergibt" eine ausreichende Definition der erfinderischen Tätigkeit. Eine allgemein akzeptierte Definition der erfinderischen Tätigkeit ist schwer zu erhalten, weil der Begriff technische Normen, Datenverwaltung, Management- und Organisationsfragen beinhaltet, die nicht die gleiche bei jedem Land sind. Zur Bestimmung der erfinderischen Tätigkeit müssen die Prüfer und die Gerichte alle schriftliche Dokumente, mündliche Beschreibungen und Anwendungsfälle im Rahmen des entsprechenden Stands der Technik unter Berücksichtigung nehmen und diese mit der beanspruchten Lösung vergleichen, unter der Voraussetzung, dass alle oben Genannte sich für den Fachmann in naheliegender Weise aus dem Stand der Technik ergeben.